BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ALFREDO A., JR., Claimant, and NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2011100739

DECISION

Administrative Law Judge Ralph B. Dash heard this matter in Los Angeles, California on March 1, 2012.

Alfredo A. represented Alfredo A., Jr. (Claimant).

Rhonda Campbell, Contract Officer, represented North Los Angeles County Regional Center (Regional Center).

ISSUE

The issue in this matter is whether Claimant is eligible for services from the Regional Center.

FACTUAL FINDINGS

1. Claimant is five and one-half years old (date of birth October 31, 2006). He lives with his parents and baby brother. At age three, Claimant was diagnosed with developmental delay in learning, speech and language skills. He was enrolled in a Head Start preschool program for one year where he received speech therapy. Claimant's pediatrician referred him to the Regional Center with a diagnosis of "rule out autism."

2. Regional Center conducted a social assessment of Claimant on February

16, 2010 (Exhibit 3). Claimant's functioning was assessed in five specific areas, motor skills, self-care, social/behavioral, cognitive, and communication.

a. There were no concerns reported or addressed with motor skills.

b. In self-care, it was noted that Claimant was currently toilet training but "likes to be as independent as he can." He changes his own clothes, eats with a spoon with little spillage, puts his toys away, can pour beverages and will tell his mother when he is not feeling well.

c. Under social/behavioral, Claimant was described as a "friendly little boy who seeks out to play with others." He is able to take turns and shares his toys. He is able to read his parents' facial expressions. His parents denied there were any repetitive behaviors, unusual body movements or obsessive interests. He does have temper tantrums and sometimes is overly aggressive at play. He makes "fair eye contact." He engages in imaginary play.

d. Under cognitive ability, it was noted that Claimant responds to his name, can state his age and point to body parts. However, he was not particularly cooperative with the interviewer and refused to answer other questions.

e. Under communication, it was noted that Claimant often communicates by pointing, but does use words and phrases. His speech is difficult to understand. He may have a conversation with his parents but not with others and does best with simple words and simple directions.

3. Ann L. Walker, Ph.D., conducted a psychological evaluation of Claimant on April 13, 2010 (Exhibit 5). In addition to reviewing records and conducting a clinical interview of Claimant, Dr. Walker administered numerous tests, including the Wechsler Preschool and Primary Scales of Intelligence-3rd edition (WPPSI-III), the Autism Diagnostic Observational Schedule, Module 2 (ADOS, Module 2), the Autism Diagnostic Interview-Revised (ADI-R), the Gilliam Autism Rating Scale, 3rd Edition (GARS-3) and the Vineland Adaptive Behavior Scales-2nd Edition (VABS-II).

4. On the WPPSI-III, Claimant achieved a full-scale of IQ of 92 which is within the normal range. On the ADOS 2, Module 2, ADI-R, and the GARS-3, Claimant's scores were all below the autism threshold. The ADOS-2 showed Claimant with a score of 3, whereas the autism cutoff is 12 and the autism spectrum cutoff is 8. The ADI-R showed similar results, with the scores well below the autism cutoff. The GARS-2 scores in each of the four domains measured were all rated as "unlikely probability of Autism range." Claimant's composite score on the VABS-II was 86, which is right on the dividing line between "borderline" (below 85) and normal (85 and above).

5. In her summary, Dr. Walker stated:

> [Claimant] shows many behaviors inconsistent with the diagnosis of Autistic Disorder. He was observed using eye contact to modulate social

interaction. [Claimant] is developing peer relationships appropriate to his development level in that he is able to initiate interaction. He will go to play with children who approach him. He engages in cooperative, interactive, imitative and imaginary play with other children. [Claimant] is able to share interests and enjoyment. [He] shows emotional reciprocity. [His] parents report that he shows no significant delays in expressive or receptive language skills. They reported no echolalia and no jargoning.

[¶] . . . [¶]

[T]he diagnosis of Autistic Disorder is not recommended.

[¶] . . . [¶]

[Claimant] should be referred for a Speech Therapy Evaluation through the public schools to determine whether he shows significant delays in language articulation skills. If [Claimant] shows significant delays in language articulation skills, he might be considered for Speech Therapy through the public schools. Appropriate preschool placement should be determined by the school district in collaboration with [Claimant's] parents.

6. After spending one year in Head Start, Claimant transitioned to the Los Angeles Unified School District (District). At an Individualized Education Plan (IEP) meeting conducted May 26, 2011 (Exhibit 7), at Canoga Park Elementary School, the District found Claimant eligible for special education services under the category "Specific Language Impairment." The IEP team agreed Claimant should be accorded preferential seating, redirection, repetition, visual and verbal cues/prompting, rephrasing prompts, modeling, language development support and daily structured language activities facilitated by an adult.

7. Claimant's parents noticed a change in Claimant's behavior at school in 2011 and had him examined by his pediatrician. In a note dated September 22, 2011, the pediatrician wrote, "Recently, Alfredo manifest (*sic*) some change in behavior and emotional reaction related to [a] recent school stressful event.[1] He feels nervous, anxious, fearful, cries on and off, refuses to attend school and he is having daytime and nighttime bedwet (*sic*). He needs additional help in certain areas . . . in the classroom dealing with his educational weakness . . ."

8. Dr. Walker conducted a school observation of Claimant on November 8, 2011 (Exhibit 11). In addition to observing Claimant in the classroom, Dr. Walker also interviewed Claimant's teacher and had her complete both the ADI-R and GARS-2 responses. The results of each of these tests showed Claimant did not have autism. Dr.

[1] According to his father, a teacher locked Claimant in a dark bathroom as a punishment "timeout" for his bad behavior. This was the stressful event referred to by Claimant's pediatrician.

Walker completed her observation report by stating, "[Claimant] should be referred for Behavioral Intervention at school, to address his rough play with peers. [He] might require a one on one aide until his behavior improves. . . . Appropriate school placement and services should be determined by the school district in collaboration with [his] parents." After the school observation, and coupled with all of her testing and interviews, Dr. Walker diagnosed Claimant as having "Phonological Disorder (By History), Mixed Receptive Expressive Language Disorder (By History), Disruptive Behavior Disorder NOS (Plays too roughly with peers), [and] Enuresis."

9. The District conducted another IEP meeting on January 23, 2012 (Exhibit 17). In addition to his father, both Claimant's special and general education teachers, the school nurse, staff speech therapist and staff occupational therapist were present. After detailing Claimant's strengths and weaknesses in many areas, including speech and language, motor skills, reading, writing, and social skills, the IEP team concluded:

> Based on current assessments, teacher comments, and student records, [Claimant] has difficulty in the psychological process area of auditory processing, visual processing, attention and expression. He scored in the low to well below average range in auditory processing (word discrimination, phonological segmentation, phonological auditory comprehension and range in auditory reasoning) and in visual processing (visual discrimination, visual memory, visual form constancy, and visual figure ground). Teacher reports that he lacks focus, is easily distracted, has poor writing skills, lacks coordination, and his speech is not understandable. Based on teacher and parent behavior surveys and student observation/records, [Claimant] has difficulty maintaining necessary levels of attention at school. The problems experienced by him might disrupt academic performance in other areas. [Claimant] at times displays [a] moderately high number of disruptive, impulsive, and uncontrolled behaviors. . . .
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> Based on current assessments, student records, student observations, teacher and parent comments, it appears that [Claimant] meets the eligibility criteria [for special education services] as a student with a Specific Learning Disorder due to psychological processing deficits in the areas of visual processing, auditory processing and attention.

LEGAL CONCLUSIONS

1. Claimant has not established that he suffers from a developmental disability entitling him to Regional Center services. (Factual Findings 1 through 9.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Regional Center's decision. Where a claimant seeks to establish eligibility for services, the burden is on the appealing

claimant to demonstrate that the regional center's decision is incorrect. Claimant has not met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a) defines "developmental disability" as:

> a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4(a). To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability."

4(b). California Code of Regulations, title 17, section 54001 states, in pertinent part:

> (a) "Substantial disability" means:
> (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
> (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
> (A) Receptive and expressive language;
> (B) Learning;
> (C) Self-care;
> (D) Mobility;
> (E) Self-direction;
> (F) Capacity for independent living;
> (G) Economic self-sufficiency.

5(a). In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental

retardation." (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

5(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual, fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Regional Center does not have a duty to serve all of them.

5(c). While the Legislature did not define the fifth category, it did require that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a)) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on IQ scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment.

6. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) is a well respected and widely used classification system of mental disorders, explaining the criteria necessary to establish that one does, or does not, have a particular disorder. The DSM-IV-TR describes mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final

common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . .

7. The only evidence of Claimant's IQ is the single test administered by Dr. Walker (Finding 4). That test, showing Claimant has a full scale IQ of 92, has placed him in the normal range of intelligence. Accordingly, he cannot be considered to have mental retardation, even if he exhibits some or all of the adaptive deficits in the categories listed in Conclusion 4. Similarly, Claimant cannot be said to fall within the "fifth category," as his IQ is so far beyond the level of mental retardation that, whatever deficits he may have, his condition is not similar to mental retardation.

8. Beginning at page 75 of the DSM-IV-TR, the diagnostic criteria for Autistic Disorder are described as follows:

"A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

"(1) qualitative impairment in social interaction, as manifested by at least two of the following:

"(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

"(b) failure to develop peer relationships appropriate to developmental level

"(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

"(d) lack of social or emotional reciprocity

"(2) qualitative impairments in communication as manifested by at least one of the following:

"(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

"(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

"(c) stereotyped and repetitive use of language or idiosyncratic language

"(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

"(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

"(a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

"(b) apparently inflexible adherence to specific, nonfunctional routines or rituals

"(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

"(d) persistent preoccupation with parts of objects

"B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

"C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder."

9. The evidence established that Claimant does not have autism. Taking the above criteria in sequence:

Category A 1

a. Claimant does not have a marked impairment in non-verbal behaviors. He was observed using eye contact and facial expression to modulate social interaction.

b. Claimant is developing peer relationships appropriate to his developmental level, but he plays too roughly with children, which arguably could be considered a developmental deficit.

c. Claimant shares interests and enjoyment.

d. Claimant shows emotional reciprocity.

Category A 2

a. Claimant does show significant delays in language skills development.

b. Claimant does not engage in reciprocal conversations, except with his parents.

c. No echolalia or jargoning was reported or observed.

d. Claimant engages in imaginary play.

Category A 3

a. Other than a brief reference to Claimant's need to have a certain number of crayons (see, Exhibit 11), Claimant shows no repetitive or stereotyped patterns of behavior.

b. There was no evidence Claimant adhered to an inflexible routine.

c. There was no evidence Claimant showed repetitive mannerisms.

d. There was no evidence Claimant has any unusual sensitivities or that he is preoccupied with parts of objects.

Categories B and C are irrelevant to this discussion.

10. It appears the District's determination Claimant has a Specific Learning Disorder (Finding 9) is correct. Learning disabilities are often identified by school psychologists, clinical psychologists, and neuropsychologists through a combination of intelligence testing, academic achievement testing, classroom performance, and social interaction and aptitude. Other areas of assessment may include perception, cognition, memory, attention, and language abilities. The resulting information is used to determine whether a child's academic performance is commensurate with his or her cognitive ability. If a child's cognitive ability is much higher than his or her

academic performance, the student is often diagnosed with a learning disability. The DSM-IV-TR and many school systems and government programs diagnose learning disabilities in this way (DSM-IV-TR uses the term "disorder" rather than "disability".)

11. Learning disabilities[2] are associated with brain dysfunctions that affect a number of basic skills. Perhaps the most fundamental is sensory-perceptual ability—the capacity to take in and process information through the senses. Difficulties involving vision, hearing, and touch will have an adverse effect on learning. Although learning is usually considered a mental rather than a physical pursuit, it involves motor skills, and it can also be impaired by problems with motor development. Other basic skills fundamental to learning include memory, attention, and language abilities.

12. The three most common academic skill areas affected by learning disabilities are reading, writing, and arithmetic. Some sources estimate that between 60 percent and 80 percent of children diagnosed with learning disabilities have reading as their only or main problem area. Learning disabilities involving reading have traditionally been known as dyslexia; currently, the preferred term is reading disorder. A wide array of problems is associated with reading disorder, including difficulty identifying groups of letters, problems relating letters to sounds, reversals and other errors involving letter position, chaotic spelling, trouble with syllabication (breaking words into syllables), failure to recognize words, hesitant oral reading, and word-by-word rather than contextual reading.

13. Writing disabilities, known as dysgraphia or disorder of written expression, include problems with letter formation and writing layout on the page, repetitions and omissions, punctuation and capitalization errors, "mirror writing" (writing right to left), and a variety of spelling problems. Children with dysgraphia typically labor at written work much longer than their classmates, only to produce large, uneven writing that would be appropriate for a much younger child.

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[2] California Code of Regulations, title 17, section 54000, subdivision (c)(2) provides:

> Developmental Disability shall not include handicapping conditions that are:
>
> [¶] . . . [¶]
>
> (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

14. Learning abilities involving math skills, generally referred to as dyscalcula (or dyscalculia) or mathematics disorder, usually become apparent later than reading and writing problems—often at about the age of eight. Children with dyscalcula may have trouble counting, reading and writing numbers, understanding basic math concepts, mastering calculations, and measuring. This type of disability may also involve problems with nonverbal learning, including spatial organization.

15. As the evidence was clear that Claimant does not have a developmental disability enumerated in the Welfare and Institutions Code, it is unnecessary any adaptive deficits Claimant may have.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Regional Center's determination that Claimant is not eligible for regional center services is sustained, and Claimant's appeal of that determination is denied.

DATED:_____

_____
RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

Notice

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.